Zaidi bin Saad v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–146 OF 2011
BALIA YUSOF, MOHTARUDIN BAKI AND TENGKU MAIMUN JJCA
18 NOVEMBER 2013

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged with drug trafficking — Whether appellant had knowledge of drugs found in boot of car — Whether trial judge failed to re-evaluate prosecution's case — Whether trial judge failed to properly consider defence — Whether present panel bound by decision of earlier panel of this court — Whether conviction safe

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Acting on information received on drug trafficking, a police officer acting as an agent (SP6) had negotiated for the purchase of 20kg of cannabis at a price of RM1,650 per kg. Based on that negotiation, SP6 had arranged for an ambush to be carried out during the forthcoming meeting between him and the supplier. At that meeting, SP6 had been introduced to the appellant who informed him that he was only able to supply 15kg of the 'barang'. The appellant had then unlocked the boot of a car, in which there was a red bag. When SP6 opened the bag and found it to contain slabs of dried plant material, he gave the pre-arranged signal for the ambush party to move in. All the three persons present at the scene of the incident, including the appellant were arrested. The slabs were later confirmed by the chemist to be 14,832g of cannabis and the three accused were jointly charged with the offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') read together with s 34 of the Penal Code ('Code'). At the end of the prosecution's case, the trial judge acquitted and discharged all three accused persons without their defence being called. When the public prosecutor appealed to the Court of Appeal the appeal against the appellant was allowed. Pursuant to the order of the Court of Appeal, the appeal was brought before the High Court where an amended charge was preferred against the appellant. The amended charge was the same as the original charge except that s 34 of the Code was excluded. In his defence, the appellant testified on oath that the car in which the bag containing the drugs was found did not belong to him and that he had borrowed the car for his friend, one Saiful, who had the use of the car for 2–3 hours. The trial judge held that the appellant had failed to raise a reasonable doubt on the prosecution's case. The appellant was convicted and sentenced to death and hence the present appeal. The appellant submitted that the trial judge had failed to re-evaluate the prosecution's case in the light of the defence and also failed to properly consider the defence that he had no knowledge of the drugs found in the bag in the boot of the car. The

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A appellant also raised the issue as to whether the present panel of this court was bound by the decision of the earlier panel of this court in calling for the appellant to enter his defence.

Held, dismissing the appeal:

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(1) Having perused the grounds of judgment it was clear that there were no merits in the appellant's argument that the trial judge had failed to re-evaluate the prosecution's case and to consider the defence. The trial judge had addressed his mind to the issue of possession before finding that the defence had failed to raise a reasonable doubt on the C prosecution's case. Further, the appellant's defence that the car was taken by Saiful for 2–3 hours was a recent invention (see paras 14–15).

(2) The failure of the trial judge to deal with the issue of credibility of SP6 and the raiding officer had not rendered the conviction of the appellant D unsafe. It was not the appellant's defence that the drugs found in the boot of the car belonged to another or that he did not open the boot of the car or for that matter that he was not anywhere near the car when he was arrested. The appellant's defence was that the car was taken by Saiful. However, this version was not put to the prosecution's witnesses. Further, E at the scene of the incident it had been the appellant who had come out of the driver's seat of the car to meet SP6 and who had opened the boot of the car in which the bag containing the drugs was found. These facts were sufficient to prove custody, control and knowledge and hence possession of the drugs by the appellant. By virtue of the weight of the F drugs recovered, the trial judge was entitled to invoke the presumption of trafficking under s 37(da) of the DDA. Thus, the conviction of the appellant was safe (see paras 19, 20 & 23).

(3) It is settled law that the decision of the earlier panel of this court, calling G for the appellant to enter his defence, should not be disturbed (see para 23).

[Bahasa Malaysia summary

Bertindak berdasarkan maklumat yang diterima berhubung pengedaran H dadah, pegawai polis yang bertindak sebagai ejen (SP6) telah berunding untuk belian 20kg kanabis pada harga RM1,650 sekilogram. Berdasarkan perundingan itu, SP6 telah mengatur satu serbuan untuk dijalankan semasa mesyuarat akan datang antaranya dan pembekal. Pada mesyuarat tersebut, SP6 telah diperkenalkan kepada perayu yang telah memberitahunya bahawa dia I hanya boleh membekal 15kg 'barang' tersebut. Perayu kemudian telah membuka but kereta, di mana terdapat beg merah. Apabila SP6 membuka beg itu dan mendapati ia mengandungi kepingan bahan tumbuhan kering, dia telah memberi isyarat yang telah ditetapkan sebelumnya untuk pihak serang hendap bergerak masuk. Kesemua tiga orang di tempat kejadian itu, termasuk

perayu telah ditangkap. Kepingan tersebut kemudian telah disahkan oleh ahli kimia sebagai kanabis seberat 14,832kg dan ketiga-tiga tertuduh itu telah dituduh bersama kerana kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang dibaca bersama s 34 Kanun Keseksaan ('Kanun'). Di akhir kes pendakwaan, hakim pendakwaan telah membebas dan melepaskan kesemua tiga tertuduh tanpa pembelaan mereka dipanggil. Apabila pendakwa raya merayu kepada Mahkamah Rayuan rayuan terhadap perayu telah dibenarkan. Menurut perintah Mahkamah Rayuan, rayuan itu telah dimulakan di hadapan Mahkamah Tinggi di mana pertuduhan yang dipinda telah dibuat terhadap perayu. Pertuduhan yang dipinda itu adalah sama dengan pertuduhan asal kecuali di mana s 34 Kanun dikecualikan. Dalam pembelaannya, perayu memberi keterangan bersumpah bahawa kereta di mana beg yang mengandungi dadah itu dijumpai bukan miliknya dan bahawa dia telah meminjam kereta itu untuk kawannya, Saiful, yang telah menggunakan kereta itu untuk 2–3 jam. Hakim perbicaraan memutuskan bahawa perayu telah gagal menimbulkan keraguan munasabah berhubung kes pendakwaan. Perayu telah disabitkan dan dihukum mati dan justeru rayuan ini. Perayu berhujah bahawa hakim perbicaraan telah gagal untuk menilai semula kes pendakwaan berdasarkan pembelaan dan juga gagal untuk menimbangkan sewajarnya pembelaan bahawa dia tiada pengetahuan tentang dadah yang dijumpai dalam beg dalam but kereta itu. Perayu juga menimbulkan isu berhubung sama ada panel sedia ada mahkamah ini terikat dengan keputusan panel terdahulu mahkamah ini dalam memanggil perayu untuk memasukkan pembelaannya.

Diputuskan, menolak rayuan:

(1) Setelah meneliti alasan-alasan penghakiman ia adalah jelas bahawa tiada merit dalam hujah perayu bahawa hakim perbicaraan telah gagal menilai semula kes pendakwaan dan untuk mempertimbangkan pembelaan itu. Hakim perbicaraan telah mengarah mindanya kepada isu milikan sebelum mendapati bahawa pembelaan telah gagal untuk menimbulkan keraguan munasabah atas kes pendakwaan. Selanjutnya, pembelaan perayu bahawa kereta itu telah diambil oleh Saiful untuk 2–3 jam hanya baru direka (lihat perenggan 14–15).

(2) Kegagalan hakim perbicaraan untuk mengendalikan isu kebolehpercayaan SP6 dan pegawai serbuan tidak menjadikan sabitan perayu tidak selamat. Ia bukan pembelaan perayu bahawa dadah itu dijumpai dalam but kereta milik orang lain atau bahawa dia tidak membuka but kereta itu atau walhal dia tidak berada berdekatan kereta itu semasa dia ditangkap. Pembelaan perayu adalah bahawa kereta itu telah diambil oleh Saiful. Walau bagaimanapun, versi ini tidak dikemukakan kepada saksi-saksi pendakwaan. Selanjutnya, di tempat kejadian hanya perayu yang keluar dari tempat duduk pemandu untuk berjumpa SP6 dan yang telah membuka but kereta di mana beg

A mengandungi dadah itu dijumpai. Fakta-fakta tersebut mencukupi untuk membuktikan jagaan, kawalan dan pengetahuan dan justeru milikan dadah oleh perayu. Berdasarkan berat dadah yang ditemui, hakim perbicaraan berhak menggunakan andaian pengedaran di bawah s 37(da) ADB. Oleh itu, sabitan perayu adalah selamat (lihat perenggan B 19, 20 & 23).

(3) Adalah undang-undang tetap bahawa keputusan panel terdahulu mahkamah ini, memanggil perayu untuk memasuki pembelaannya, tidak patut diganggu (lihat perenggan 23).]

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Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

D **Cases referred to**

Ahmadi bin Yahya v PP [2012] 6 MLJ 37, CA (refd)

Mat v PP [1963] MLJ 263 (refd)

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)

E *PP v Abdul Rahman bin Akif* [2007] 5 MLJ 1, FC (refd)

Legislation referred to

Criminal Procedure Code s 182A

Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a), (2)

F Penal Code s 34

Appeal from: Criminal Trial No 58–02 of 2000 (High Court, Taiping)

G *K Kumaraendran (Kumar & Co) for the appellant.*

Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

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[1] The appellant ('the second accused') was charged in the High Court Taiping with two others ie Saiful Fazali bin Zulkifli ('the first accused') and Ubaidullah bin Mohd Said ('the third accused') for trafficking in dangerous I drugs ie 14,832g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39B(2) of the same Act read together with s 34 of the Penal Code. At the end of the prosecution's case, the learned trial judge acquitted and discharged all three accused persons without defence being called. Dissatisfied with the decision, the public prosecutor appealed to the

Court of Appeal vide MRRJ No A-05–46 of 2003 where the Court of Appeal made the following orders:

(a) the appeal against the first accused was dismissed. The order of the learned trial judge on his acquittal and discharge was affirmed;

(b) the appeal against the appellant was allowed. The appellant was ordered to enter his defence; and

(c) the notice of appeal against the third accused was struck out as it was not served on the third accused.

[2] Pursuant to the order of the Court of Appeal, the appellant was brought before the High Court Taiping where an amended charge was preferred against him. The particulars of the amended charge were the same as the original charge minus s 34 of the Penal Code. Having heard the defence, the learned trial judge found that the defence has failed to raise a reasonable doubt on the prosecution's case and has failed to rebut the presumption under s 37(da) of the Act on the balance of probabilities. The appellant was convicted and sentenced to death, hence the appeal before us. After hearing the appeal, we unanimously dismissed the appeal and confirmed the conviction and sentence of the High Court. We now give our reasons.

[3] Learned counsel for the appellant raised the following three main issues:

(a) that the learned trial judge had failed to comply with s 182A of the Criminal Procedure Code in failing to re-evaluate the prosecution's case in the light of the defence;

(b) that the learned trial judge had not properly considered the defence; and

(c) that the Court of Appeal was wrong in calling for the defence.

[4] As submitted by learned counsel for the appellant, the first and the second issues are interwoven. In considering the above issues, it is necessary to set out the prosecution and the defence case.

[5] The prosecution's case was that on 15 August 1998, based on information received on drug trafficking, Insp Zulkifli instructed Sgt Busra bin Abdul Kadir ('SP6') to be an agent provocateur. SP6 was introduced to an informer by Insp Zulkifli. The informer in turn introduced SP6 to a man called 'Man' at a food court, in front of Grik Rest House, Perak. SP6 introduced himself as 'Ibrahim' and spoke to Man on the supply of *ganja*. The informer was present but did not take part in the conversation. Man told SP6 that Man does not have the supply with him at the moment and that Man will contact SP6 when he has the supply. SP6 then left with the informer.

[6] On 19 August 1998, SP6's number was given to the informer to be passed to Man. On 24 August 1998 at about 9.30am SP6 received a call from Man to come to Grik. SP6 arrived with two other police personnel. SP6 left the two personnel at the town while he proceeded to the food court in front of the Rest House. SP6 met Man and Man told SP6 that he wanted to introduce SP6 to 'Amy'. They left in SP6's car to go to Amy's house. They went to Amy's house but Amy was not there. They went back to the Grik Rest House. SP6 checked Amy's house again later but Amy was still not around. SP6 then made his way to Ipoh. On the way back, SP6 received a call from Man to come back saying that Amy wanted to meet him. At Simpang Jalan Lawin, Kuala Kangsar, SP6 was introduced to Amy ('the third accused').

[7] SP6 had a discussion with Amy on the supply of the drugs. Amy agreed to supply 20kg at a price of RM1,650 per kg. Amy informed SP6 that he will call the next day to confirm the supply. On 25 August 1998 at about 9.30am, SP6 received a call from Amy confirming the supply and asked SP6 to meet at 11.30am at the same place that they had met the previous night. SP6 informed his superior and a briefing was held on the operation. SP6 was to scratch his head as a signal to arrest.

[8] At about 11.30am, SP6 arrived at the meeting place. Amy arrived later in a car ACW 5450. SP5 showed Amy the money. After he had seen the money, Amy called someone and asked SP6 to follow him to Changkat Jering R&R. SP6 followed Amy's car. When they arrived at Changkat Jering R&R, SP6 saw a man (the appellant) approaching Amy. SP6 came to them and he was introduced to the appellant. After being introduced, the appellant told SP6 that he had a problem as there was only 15kg of the *barang*. SP6 said it was all right and that he wanted to see the *barang*. Amy asked the appellant to show SP6 the *barang* and all three then went to a car bearing registration No BBY 671. Seated at the front passenger seat was the first accused.

[9] The appellant went to the driver's door, opened it and unlocked the boot of the car and went to the back where Amy and SP6 were standing. The appellant opened the boot of the car. SP6 saw a red bag (exh P4). The appellant said 'barang ada dalam beg merah.' SP6 opened the bag and found slabs of dried plant material which were later confirmed by the chemist ('SP9') to be 14,832g of cannabis. SP6 gave the signal and all three accused persons were arrested.

[10] The car BBY 671 was owned by Abdul Halim bin Jali ('SP5'). SP5 is the appellant's friend. According to SP5's wife, Napisah bt Hassan (SP8), while

SP5 was at work on 25 August 1998, the appellant had borrowed the car.

THE DEFENCE

[11] The appellant gave evidence on oath. The defence was that he had borrowed the car for his friend, Saiful; that he had gone together with Saiful to borrow the car from SP8 after which the car was taken by Saiful for 2–3 hours and that after Saiful came back, they had gone to Ipoh with Saiful driving the car. They stopped at the rest area along the Highway as Saiful wanted to rest. The appellant went to the restroom and when he came back, Saiful was seated at the passenger's side. The appellant went to the driver's seat. After a few minutes, the appellant said Saiful received a call and a few minutes later, Saiful's friends arrived and came to the driver's side. The appellant came out from the car and met them. Saiful wanted to open the boot of the car but he could not open it as the car was an old car and there was some problem in opening the boot. Saiful asked the appellant to open the boot. The appellant managed to open the boot. Thereafter the appellant said he saw Saiful's two friends went to the boot while he remained near the driver's side. When the friends opened the boot, they were all arrested.

[12] The appellant thus denied that he had knowledge of anything found in the boot. He further said that he had not seen exh P4 before his arrest and that he had no knowledge of the drugs.

OUR FINDINGS

[13] The relevant part of the evidence of the appellant to show that he had no knowledge of the drugs found in the boot of the car relates to the borrowing of the car. The prosecution's case was that it was the appellant who had borrowed the car from SP8 where the evidence of SP8 was that the appellant came alone to borrow the car. The defence on the other hand said that the appellant came together with Saiful to borrow the car and that thereafter, it was Saiful who had taken the car for 2–3 hours.

[14] Having perused the grounds of judgment, we find no merits in the argument of learned counsel that the learned trial judge had failed to re-evaluate the prosecution's case and to consider the defence. At paras 8 and 9 of the grounds of judgment, the learned trial judge said:

> 8 Mahkamah ini mendapati bahawa kebanyakan keterangan tertuduh Zaidi bin Saad dalam peringkat pembelaan yang sepatutnya dan harus dicadangkan kepada saksi-saksi pendakwaan khususnya kepada SP8 tidak dilakukan. Dalam pembelaan, tertuduh menyatakan bahawa pada tarikh kejadian iaitu pada 25 Ogos 1998 apabila kereta bernombor pendaftaran WBJ 671 (eksibit P71) dipinjam daripada SP8, iaitu kereta kepunyaan suaminya (SP5) dan setelah menerima kunci kereta daripada SP8,

A kereta tersebut diambil oleh tertuduh pertama, Saiful Fazali bin Zulkifli (selepas ini dirujuk sebagai 'Saiful'). Tertuduh juga menyatakan bahawa Saiful telah bawa kereta dan keluar dari tempat SP8 di mana tertuduh ditinggalkan di tempat SP8. Saiful kembali bersama kereta lebih kurang dua hingga tiga jam. Tertuduh juga menyatakan apabila Saiful telah kembali bersama kereta selepas dua hingga tiga jam, Saiful mengajak tertuduh makan dan jalan-jalan di Ipoh, Saiful berhenti di perhentian Cangkat Jering di mana mereka telah ditangkap.

9 Mahkamah ini mendapati kemungkinan keterangan bahawa Saiful telah mengambil kereta dan keluar selama dua hingga tiga jam berseorangan dikemukakan dalam kes pembelaan, samada untuk menimbulkan keraguan atau samada untuk menunjukkan tertuduh tidak mempunyai pengetahuan terhadap barang kes dalam boot kereta tersebut kerana kereta tersebut dikatakan dipandu keluar oleh Saiful dan kereta tidak bersama tertuduh selama dua hingga tiga jam …Walaubagaimanapun, tidak ada sebarang alasan munasabah kenapa perkara atau keterangan itu tidak dikemukakan melalui SP8 atau dicadangkan kepada SP8 dalam peringkat kes pendakwaan. Di sini, adalah penting untuk menyatakan

Pertama, sekiranya perkara itu bahawa tertuduh ditinggalkan di tempat SP8 dan Saiful membawa kereta (P17) keluar berseorangan dan balik selepas dua hingga tiga jam adalah benar, kemungkinan SP8 dapat mengingati atau memastikan perkara itu dan pembelaan patut mendapat (elicit) atau mencadangkan kepada SP8 tentang perkara tersebut. Malangnya, perkara itu langsung tidak dicadangkan kepada SP8. Sebaliknya, SP8 berkata tertuduh datang seorang diri untuk meminjam kereta dan kunci kereta diberikan kepada tertuduh. Pendek kata, kewujudan Saiful di tempat SP8 pada tarikh kejadian atau pada masa kereta itu dipinjam langsung tidak wujud dan keterangan SP8 juga tidak dicabar … Oleh kerana kewujudan Saiful di tempat SP8 pada masa kereta tersebut dipinjam tidak dicadangkan kepada SP8, ini bermakna keterangan SP8 bahawa tertuduh datang seorang diri untuk meminjam kereta tersebut diterima oleh tertuduh dan keterangan itu adalah benar. (Rujuk kes *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 yang diikuti dalam kes *Megat Halim Megat Omar v Public Prosecutor* [2008] MLJU 647; [2009] 1 CLJ 154 di ms 167–168).

Kedua, tidak ada sebarang permohonan dibuat kepada Mahkamah bagi pembelaan di peringkat kes pembelaan atau sebaik sahaja pertuduhan pindaan dikemukakan pada 7 Januari 2011 untuk memanggil semula SP8 atau mana-mana saksi pendakwaan kerana pembelaan bebas untuk berbuat demikian … Sekiranya permohonan tersebut dibuat dan sekiranya permohonan dibenarkan, pembelaan akan mendapat peluang untuk mencadangkan atau membangkitkan perkara tersebut …

[15] Although the learned trial judge made a remark at para 12 of the grounds of judgment that 'Mahkamah ini juga mendapati isu pengetahuan barang kes atau beg (eksibit P4) yang dihujahkan oleh peguam tertuduh tidak timbul lagi memandangkan Mahkamah Rayuan mendapati pendakwaan telah berjaya membuktikan satu kes prima facie', we find that the learned trial judge did address his mind to the issue of possession when His Lordship states vide para 9 that '... keterangan bahawa Saiful telah mengambil kereta dan keluar

selama dua atau tiga jam berseorangan dikemukakan dalam kes pembelaan, samada untuk menimbulkan keraguan atau samada untuk menunjukkan tertuduh tidak mempunyai pengetahuan terhadap barang kes dalam boot kereta tersebut kerana … kereta tidak bersama tertuduh selama dua hingga tiga jam …'. It was His Lordship's finding that the defence had failed to raise a reasonable doubt on the prosecution's case and the defence that the car was taken by Saiful for 2–3 hours was a recent invention.

[16] Further, the learned trial judge states at para 11:

> 11 Mahkamah ini sedar bahawa tugas pembelaan adalah hanya untuk menimbulkan keraguan yang munasabah ke atas kes pendakwaan dan tugas pendakwaan di akhir kes pembelaan adalah untuk membuktikan pertuduhan pindaan melampaui keraguan yang munasabah terhadap tertuduh. Walaupun pembelaan tidak mempunyai tugas untuk memanggil seorang saksi bagi menyokong kes pembelaan, Mahkamah ini berpendapat tertuduh tidak menggunakan peluang yang sedia ada untuk membuat permohonan untuk memanggil semula SP8 supaya pembelaan dapat (*elicit*) keterangan selanjutnya samada tertuduh memang datang bersama Saiful pada 25 Ogos 1998 dan tertuduh ditinggalkan di tempat SP8 selama 2 atau 3 jam sebaik sahaja kunci kereta diberikan kepada tertuduh oleh SP8. Seterusnya, samada Saiful membawa kereta keluar berseorangan dan kembali ke tempat SP8 selepas dua atau tiga jam dan mengambil tertuduh dan keluar semula sehingga sampai di Perhentian Changkat Jering.

[17] And at para 13:

> 13 Di atas keseluruhan kes ini, Mahkamah ini mendapati pembelaan gagal menimbulkan keraguan yang munasabah ke atas kes pendakwaan terhadap pertuduhan pindaan. Seterusnya pembelaan tertuduh adalah satu pembinaan baru (*recent invention*) dan fikiran semula dimana keterangan seperti ini patut dicadangkan kepada saksi-saksi pendakwaan dalam peringkat kes pendakwaan tetapi tidak dilakukan terlebih awal. (Rujuk kes *Public Prosecutor lwn Lin Lian Chen* [1992] 2 MLJ 561; [1992] 1 CLJ 285 di ms 292)...

[18] The complaint raised by learned counsel for the appellant was that except for SP8, the learned trial judge did not re-evaluate the evidence of the prosecution witnesses; the credibility of SP6 and SP7 (the raiding officer) and the role played by Man. The issue of credibility concerns the inconsistency in the evidence of SP6 and SP7 on the conversation between SP6 and the appellant at the scene. The evidence of SP6 revealed that he had conversation with the third accused and the appellant together while the evidence of SP7 revealed that SP6 was talking to the third accused and that the appellant joined subsequently.

[19] We accept that the learned trial judge did not specifically deal with the issue of credibility of SP6 and SP7 and the role played by Man as the learned

trial judge had taken the position that those matters had been dealt with by the Court of Appeal when defence was called. We agree with learned counsel that notwithstanding the order of the Court of Appeal for the defence to be called, the learned trial judge should not shut himself out from re-evaluating the evidence of the prosecution's witnesses. Be that as it may, we find that the failure to deal with the issue of credibility of SP6 and SP7 and the role played by Man did not render the conviction of the appellant unsafe. It was not the defence that the drugs found in the boot of the car belonged to Man or that the appellant did not open the boot or that the appellant was not at the driver's side of the car or anywhere near the car BBY 671 when he was arrested.

[20] The defence was that the car was taken by Saiful. This version was not put to the prosecution's witnesses and the evidence of the prosecution that it was the appellant who had taken the car from SP8, stood unchallenged. At the scene, it was the appellant who had voluntarily opened the door, came out from the driver's seat to meet SP6 and Amy and it was the appellant who had opened the boot of the car. By the appellant's own evidence, at the material time Saiful remained in the car at the front passenger seat These facts in our judgment, are sufficient to prove custody, control and knowledge and hence possession of the drugs by the appellant (see *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1). By virtue of the weight of cannabis, the learned trial judge was entitled to invoke the presumption of trafficking under s 37(da) of the Act.

[21] It is our judgment that the learned trial judge had addressed his mind to the directions in *Mat v Public Prosecutor* [1963] MLJ 263 and *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169. This can be seen from para 15 of the grounds of judgment where His Lordship states:

> 15 … Di sini, Mahkamah ini ingin menegaskan bahawa tertuduh tidak dikehendaki untuk membuktikan beliau tidak bersalah (*he is innocent*). Tugas pembelaan adalah hanya untuk menimbulkan keraguan yang munasabah di mana didapati tertuduh gagal menimbulkan keraguan yang munasabah …

[22] In respect of the third ground of appeal, learned counsel for the appellant had in fact re-argued the decision of the earlier panel of this court in calling for the appellant to enter his defence. It was the submission of learned counsel that this panel is not bound by the earlier panel's decision and that the present panel should reconsider the decision. We had posed the question to learned counsel as to whether we could entertain this argument. The position taken by learned counsel was that he had to take up this issue otherwise he would be barred from canvassing it later in the Federal Court.

[23] Our position is that the decision of the earlier panel of this court in calling for the defence of the appellant ought not to be disturbed (see *Ahmadi*

bin Yahya v Public Prosecutor [2012] 6 MLJ 37). In the final analysis, it is our judgment that the conviction of the appellant was safe. We therefore dismissed the appeal and affirmed the conviction and sentence imposed by the High Court.

Appeal dismissed.

Reported by Kohila Nesan